

IN THE MATTER OF UNIT MODIFICATION #2, 1975)
CASHIER AND ASSISTANT CASHIER,
WATER DEPARTMENT, CITY OF LIVINGSTON
Petitioners,
CITY OF LIVINGSTON, MONTANA
Employer,
AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, AFL-CIO
Counter-petitioner.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER AS RECOMMENDED
TO THE BOARD OF PERSONNEL
APPEALS.

I. INTRODUCTION

On 20 June, 1975, Mr. Jess E. Miller and Ms. Sue J. Bidwell, Cashier and Assistant Cashier, respectively, of the City of Livingston Water Department filed a petition for unit modification with the Board of Personnel Appeals (hereafter referred to as the Board). The petitioners proposed to be excluded from the certified collective bargaining unit: American Federation of State, County and Municipal Employees, AFL-CIO, Local 2711 (hereafter referred to as AFSCME).

On 8 July, 1975, AFSCME filed a counter-petition with the Board.

Pursuant to the Rules and Regulations of the Board, specifically MAC 24-3.8 (10) - S8070, a hearing was held on 26 August 1975, in the City Council Chambers, Livingston, Montana, to determine whether the petitioners proposed exclusion from the bargaining unit is appropriate for the purpose of collective bargaining.

As the duly appointed hearing examiner of the Board, I conducted the hearing in accordance with the provisions of the Montana Administrative Procedure Act (Section 82-4301 to 82-4225, R.C.M. 1947). Mr. Robert L. Jovick, Acting City Attorney, represented the petitioners. Mr. Stan Gerke, Field Representative, Montana State Council No. 9, AFSCME, represented Local 2711.

II. EXHIBITS AS EVIDENCE

Petitioner's Exhibit A - City of Livingston: City Codes pertaining to the Water Department;

including attachments (a) Petition for New Unit Determination and Election,
22 March 1974, (b) Certification of bargaining unit, 17 May 1974.

Joint Exhibit A - Collective Bargaining Agreement: City of Livingston and
AFSCME, Local 2711.

III. FINDINGS OF FACT

Upon a thorough review of the entire record of this case, including sworn
testimony, evidence, brief, and statutes, I make the following findings:

A. ELECTION, CERTIFICATION, AND PETITIONS:

1. On 22 March 1974, AFSCME presented a New Unit Determination and Election
Petition to the Board. AFSCME proposed a unit as later described in certification
(Finding of Fact No. 3). Authorization cards were submitted to meet the thirty (30)
percent proof-of-interest requirement (MAC 24-3.8(10) - S 8020 (3)(e).

2. On 10 May 1974, a unit determination election was conducted by the Board.
In that election twenty-two (22) employees were eligible to vote, of which
seventeen (17) valid ballots were cast. Fifteen (15) ballots were cast in favor
of AFSCME; two (2) ballots were cast in favor of NO REPRESENTATION.

3. On 17 May 1974, the Board certified AFSCME to be the exclusive representa-
tive for collective bargaining purposes for a unit consisting of, "all employees
of the City of Livingston working in the Street, Parking Meter, Garbage, Park, Water,
Sewage and Sanitation Departments, excluding supervisory and managerial personnel."¹

4. The petitioners contend in their petition that they should be excluded
from the bargaining unit for the following reasons:

(a) "We are office managers and not in direct association
with the labor forces . . ."

(b) "Due to the fact that as clerk-cashiers of the water
department our work involves totally different skills
from those of the rest of the labor forces of the city."

1. Mr. Tom Sharp, City Superintendent testified that the City does not have a parking
meter department. Those employees who work with parking meters are a part of the
street department. However, the collective bargaining agreement (Joint Exhibit A)
does list parking meter department.

2 The counter petition states in pertinent part:
3 "2. Neither the employees in question nor the City of Livingston
4 objected to the inclusion of said employees at any time during the
5 unit determination hearing or election.

6 3. The two employees in question were determined as members of
7 the proposed unit and ruled eligible to vote in the representation
8 election by an agent of the Board of Personnel Appeals."

9 AFSCME further contends in the counter-petition that the positions could not be
10 interpreted as "elected officials", "supervisory" nor "managerial". And in reference
11 to the bargaining unit itself, AFSCME stated:

12 "Allowing these two employees to be exempt from the established
13 unit would be unnecessary fragmentation of the unit and would
14 result with an undesirable precedent."

15 B. STATUTES:

16 6. The statute pertaining to management officials is 59-1602(4), R.C.M. 1947:

17 (4) "Management official means representatives of management
18 having authority to act for the agency on any matters
19 relating to the implementation of agency policy."

20 7. The statute pertaining to an appropriate unit for collective bargaining
21 is 59-1602(2), R.C.M. 1947:

22 (2) "In order to assure employees the fullest freedom in exercising
23 the rights guaranteed by this Act, the Board or an agent of the
24 Board shall decide the unit appropriate for the purpose of
25 collective bargaining, and shall consider such factors as
26 community of interest, wages, hours, fringe benefits and other
27 working conditions of the employees involved, the history of
28 collective bargaining, common supervision, common personnel
29 policies, extent of integration of work functions and inter-
30 change among employees affected, and the desire of the employees."

31 An examination of the petitioners, the brief, the statutes, and the evidence
32 at the hearing raises the following issues:

 (a) whether the two positions are managerial;

 (b) whether the two positions are appropriately included as part of this
 bargaining unit.

 In an effort to present an orderly analysis of the facts, though some will
 overlap, I am listing them into the following categories: (1) managerial;
 (2) community of interest: (a) wages, hours, fringe benefits and other working
 conditions: (b) common supervision and common personnel policies; (c) extent of
 integration of work functions and interchange among employees; (3) history of
 collective bargaining; (4) extent of union organization; (5) desire of the employees.

MANAGERIAL
2 8. The petitioners contend they should be excluded from the bargaining unit
3 because their positions are managerial in nature. To support this contention the
4 petitioners presented the following evidence and testimony:

5 The city codes pertaining to the Water Board. Section 29-5:

6 "The Board of Water Commissioners shall employ a cashier for the
7 waterworks department, who shall have full and complete charge
8 of the collections for the department. The cashier shall receive
9 a salary fixed by the Board and Shall be answerable to the board
only and may be discharged by the board."²

10 The petitioners further contend that the cashier acts as the ex-officio
11 secretary of the water board. Section 29-6:

12 "(a) The cashier of the waterworks department shall collect all revenues

13 (b) The cashier shall be financial receiving officer of the waterworks
14 department. He shall keep a complete set of accounts and controls....
He shall prepare all claims against the waterworks department and
present same for approval by the Board....

15 (d) The cashier shall keep on file all records of the board and all
16 records made by the superintendent. He shall make monthly reports
17 to the board and to the city council, showing the financial status
and operating conditions of the waterworks department.³

18 (e) The cashier shall report all delinquent water rental...to the board.
19 He shall be vigilant to detect and warn against abuses, and
infringements of regulations adopted by the board.

20 (f) He shall perform all other duties as may be directed by the board."

21 9. Mr. William Gonder, Chairman of the Water Board testified, "that the
22 superintendent and the cashier and the assistant cashier carry out the policy of
23 the department." (tr. p. 3) He added that the water board meets once a month and
24 considers the cashier's position as one whereby board policy can be implemented.
25 Mr. Gonder also made reference to the city code when he testified that the cashier
26 and assistant cashier are appointed by the water board and they are directly
27

28 2. The water board for the City of Livingston is a three member board. Two citizen
29 members are appointed for a six year term by the mayor and approved by the city
30 council. Third member is also a member of the city council.

31 3. The cashier does not regularly attend city council meetings. The monthly water
32 department report is usually given to the city council by the councilman, who also
serves on the water board. The cashier or the assistant cashier attends and keeps
minutes of the water board meetings.

Mr. Tom Sharp, City Superintendent, testified that he exercises no supervision over the cashier or assistant cashier.⁵

The petitioners testified that they are under the supervision of the water board.

Mr. Jess Miller, Cashier, testified that he conducts correspondence on behalf of the water board with the Montana Public Service Commission, U.S. Department of Housing and Urban Development, other agencies, and the public. He stated that he is not only responsible for the implementation of water board policies, but also has policy input by making recommendations. An example cited was his role in the development of a preliminary budget for the water department.

Mr. Jovick, in his brief, points out that, "neither the cashier or the assistant cashier draws any overtime pay, for they are considered to be part of management (emphasis added) and, as such, are not compensated for additional time required to do their assigned duties."⁶

AFSCME presented no evidence or testimony that would be contrary to the above mentioned employment relationship between the water board and the petitioners.

D. COMMUNITY OF INTEREST

A paramount consideration in determining an appropriate bargaining unit is the identification of the bargaining unit as described in Section 59-1606(2).

10. Mr. Gonder testified that the water board is responsible for the distribution, construction, maintenance, and financial affairs of the department. On a day-to-day basis the superintendent is responsible for the distribution, construction, and maintenance aspects and the petitioners are responsible for the financial affairs.

4. Mr. Gonder testified that the two appointments are not approved by the mayor or the city council.

5. Mr. Sharp is the city superintendent and the superintendent of waterworks.

6. During the hearing Mr. Gerke raised the issue that the practice of no overtime pay may be in violation of the Fair Labor Standards Act. Certain administrative employees are exempt if they meet a series of tests set out in regulations. I am not familiar enough with the Fair Labor Standards Act to determine if the petitioners should be exempt. Furthermore, it is beyond the scope of this hearing.

2 the evidence illustrates that the petitioners basically perform accounting,
3 bookkeeping, recordkeeping and clerical duties. Whereas the other water department
4 employees operate the water plant, work on waterlines, perform skilled manual labor.

5 The other city employees in this unit are not involved with or under the
6 jurisdiction of the water board:

7 (a) wages; hours, fringe benefits and other working conditions.

8 11. The employees in the water department are paid the following wages:

9 Cashier - \$935 per month.

10 Assistant Cashier - \$550 per month. According to Mr. Miller,
11 "In my absence she draws my salary. When I am on vacation or
12 sick she (Ms. Bidwell) draws \$935 per month." (tr. p. 34)

13 Working Supervisor - \$636.90 per month, plus \$25 per month
14 as a certified operator of a water plant, plus \$100 per month
15 for supervisor differential, and longevity.

16 Operator - \$636.90 per month, plus \$25 per month as a certified
17 operator of a water plant, and longevity.

18 Serviceman - Hourly salary based on \$636.90 per month.

19 All water department employees work an eight hour day - forty hour week.

20 The exceptions are to meet emergencies or special operating necessities.

21 12. The salaries of the water department employees are paid from water
22 department funds. Other city employees are paid from funds in their respective
23 departments. The record indicates that the water department and the other city
24 employees receive similar sick, vacation and other fringe benefits.

25 13. The testimony indicates that the basic working condition differences between
26 the petitioners and the other employees in the unit is that they work in an office,
27 whereas the other employees work "at the plant or shop", and "outside".

28 (b) common supervision and common personnel policies:

29 14. The cashier, assistant cashier, and the water superintendent are appointed
30 by the water board and those persons report directly to the board.⁷ They carry out
31 the policies of the water board in between the monthly meetings. The other water
32 department employees are hired by and under the supervision of the superintendent.
33 Mr. Gonder testified that the petitioners are answerable to the board, not the

34 *7. The assistant cashier, of course, works under the supervision of the cashier.
35 Nevertheless, she does perform the duties during his absence and she is appointed
36 by the water board.*

2 The superintendent and the cashier (or the assistant cashier) are expected to
3 attend the board's meetings.

4 15. There was no evidence presented, by either party, indicating different
5 personnel policies among the water and the other departments.

6 (c) Extent of integration of work function and interchange among employees
7 affected:

8 16. Mr. Sharp testified that there is little integration of work functions
9 because the petitioners duties are very distinct from the other water department
10 employees. Though he does not exercise supervision over the petitioners, nevertheless,
11 there is some integration of work functions because there must be a link or
12 cooperation between water distribution and revenues and expenditures of funds. Mr.
13 Sharp described it as "a parallel thing." An example cited was when a citizen calls
14 the petitioners office about a water problem or service, they will in turn inform
15 the superintendent, who will direct further action. The petitioners may also write
16 up "work slips" for the "crew", but they cannot direct that the work be done.

17 The superintendent will frequently check with the petitioners about water
18 service and problems; however, the other employees infrequently come in contact
19 with the petitioners in the performance of their duties.

20 17. Mr. Sharp, Mr. Miller and Ms. Bidwell contend that the basic skills
21 required to perform the cashier and assistant cashier duties are very different
22 from the other employees.

23 In response to Mr. Jovick's question, "... comparing just the relative
24 descriptions you've given us of these three positions and the job they entail
25 (working supervisor, operator, serviceman) do you feel that they are in anyway
26 interchangeable with the position of cashier...?" Mr. Sharp's answer was, "No
27 way." The superintendent elaborated by stating that, "Anyone with a reasonable
28 degree of intelligence could perform the manual labor part of it. But they
29 couldn't perform the particular functions (operate water treatment plant-chemicals,
30 etc.)." (tr. p. 17) Mr. Sharp also didn't think that the persons trained in the
31 maintenance and operation of the water system would be able to perform bookkeeping
32 duties or visa versa without extensive training.

the person must be very familiar with bookkeeping. Only a person educated or experienced in that occupation would be hired for the position. In contrast, the operator of the water plant must obtain an operators certificate from the State Department of Health and Environmental Sciences. That person must have extensive knowledge of chlorination, electricity, production wells, water pressure, etc.

19. Mr. Gerke contends that a water plant operator, sanitation worker, or other city employees could, after a certain amount of training, become a cashier or assistant cashier. He further concludes, "I'm sure a person filling the job duties of cashier or assistant cashier could perform other jobs within the same jurisdiction as City of Livingston." (tr. p. 19)

20. There was no evidence presented to indicate a past practice of a cashier being transferred to one of the other water department positions or visa versa.

E. HISTORY OF COLLECTIVE BARGAINING

21. The City of Livingston and AFSCME signed the first collective bargaining agreement effective 1 July 1974. (Joint Exhibit A) The scope of the bargaining unit included the petitioners.

22. Ms. Bidwell testified that she was, "not really aware of negotiations. I haven't been included in any of them. All negotiations have been out in the shop with the outside crew." (tr. p. 14-15)

F. EXTENT OF UNION ORGANIZATION

23. See Finding of Facts number one, two and three.

24. Mr. Gerke argues that:

"AFSCME Union is an industrial type whereas we have everybody in the union from zookeepers to librarians to operating engineers, sanitation workers - several categories of employment you find in public employment. They shift from classification to classification..." (tr. p. 19)

G. DESIRES OF EMPLOYEES

The following testimony was presented on this point:

25. Mr. Jovick: "And relative to a particular question here, to the unionization of the employees in the water department, were you aware that this occurred sometime last year?"

Ms. Bidwell: "Yes, and at the time that we voted I was told that this had no bearing on whether you were included or excluded from the union."

2 really indicate your real intent as far as
3 what you wanted, as to the union?"

4 Ms. Bidwell: "No."

5 Mr. Jovick: "And could you state for the Board, whether or
6 not you desire to become a member of the union?"

7 Ms. Bidwell: "Personally, no, I prefer not to be in the union." (tr. p. 11)

8 Under cross-examination by Mr. Gerke, Ms. Bidwell stated she did vote in the
9 election, "under the impression that everybody was available to vote."

10 Under further cross-examination she testified that she would prefer being in a
11 clerk's union because of the qualifications required for her position.

12 26. Mr. Miller testified that he voted in the election "and I was also under
13 the impression that Ms. Bidwell was -- that our voting in the union had no bearing
14 as to whether we would be included in the bargaining unit or not."

15 Mr. Jovick: "How do you feel now as to your position, you
16 yourself being included in the bargaining unit?"

17 Mr. Miller: "I feel that duties are so different we should not
18 be part of this bargaining unit." (tr. p. 33)

19 Under cross-examination by Mr. Gerke, Mr. Miller also stated, "if there was a
20 clerk's union, that would be the one that our position should be in." (tr. p. 33)

21 DISCUSSION

22 Section 59-1602(2), R.C.M., 1947, authorizes the Board to decide the unit
23 appropriate for the purpose of collective bargaining. Through MAC 24-3.8(10) - S8089
24 the Board may conduct hearing on unit modification and to determine the appropriateness
25 of the modification petitioned for.

26 As the agent appointed by the Board, it is my responsibility to determine if
27 the modification is appropriate.

28 In order to properly discuss a unit clarification it is necessary to consider
29 the events and factors which were involved in determining the appropriateness of this
30 unit.

31 According to the City of Livingston unit determination record on file with the
32 Board, I find the following sequence of events lead to a unit determination.

33 The city employees (Labor Committee) and the City of Livingston signed a collective
34 bargaining agreement effective 2 January 1973. The contract included the employees

2 the water departments. The so called Labor Committee was recognized by the City
3 as the bargaining group or exclusive representative for the above employees.

4 Prior to the expiration of the 1973 contract the city bargaining group voted to
5 affiliate with AFSCME.

6 On January 22, 1974 a "negotiating session" was held with the employees bargaining
7 group, including the AFSCME field representative Mr. Gerke. At that time, Edmund
8 Carrell Jr. refused to negotiate with the group or Mr. Gerke. The mayor stated an
9 election should be held to prove that the employees wanted a union. In essence,
10 it appears that the mayor raised the issue of exclusive representative in accordance
11 with Section 59-1602(6) of the Montana Public Employees Collective Bargaining Act,
12 which defines an exclusive representative as:

13 "a labor organization which has been designated by the
14 Board as the exclusive representative of employees in
15 an appropriate unit or has been so recognized by the
public employer." (Emphasis added)

16 The mayor's action clearly indicates that he no longer recognized the so called
17 bargaining group as the exclusive representative and thereby raised a question of
18 representation.

19 It was the above action which precipitated the AFSCME petition for a New Unit
20 Determination and Election, filed with the Board on 22 March 1974.

21 Findings of Facts, one, two, and three adequately described the events which
22 lead up to the certification of an exclusive representative for the employees of
23 the City. However, the question is how was the certified unit previously determined to
24 be appropriate. I think it would be helpful to all parties involved to explain the
25 procedures used by the Board in this unit determination. A procedure used for all
26 unit determination cases under similar circumstances.

27 AFSCME petitioned the Board (Finding of Fact No. 1) for a unit determination and
28 election describing the appropriate unit as the same one as subsequently certified
29 (Finding of Fact No. 3). The employer did not file a counter-petition taking
30 issue with the description of the proposed unit (MAC 24-3.8(10) - S8030(4)).
31 Therefore, in accordance with MAC 24-3.8(10) - S8070(8)(a) the Board dispensed with
32 a hearing on the proposed unit and issued a "Determination of Appropriate Unit" on
15 April 1974. The order was signed by the then Chairman of the Board,

and Regulations. The rules, in effect, illustrate the Board's policy of "non-interference" if labor and management agree on the appropriateness of a unit. The Board's Rules and Regulations also allow for future modification (MAC 24-3.8 (10) - S8089).⁸ The above order was issued per the employer-union agreement, not per the result of a formal unit determination hearing. I need to give this distincti- some consideration because without the formal hearing I can only assume that the factors outlined in Section 59-1602(2) were not considered nor applied to the petitioners positions.

Therefore, the employees as part of their argument for exclusion did not need to point out how their positions have changed since the unit determination; but needed only to argue that they were inappropriately included in the first place.

The purpose of unit determination, either by agreement or hearing, is to create a stable bargaining unit, to avoid confusion and misunderstanding about the scope of a unit and therefore avoid subsequent conflicts which may lead to disruptions of meaningful collective bargaining and good labor relations. Determining an appropriate unit is a major first step in removing conflicts.

The first question that must be addressed is: Can the factors applied to unit determination also be applied to unit modification? On this point I find no Board precedent. It should be noted that perhaps because of the success of the Board's "non-interference" policy very few unit modification petitions have ever been filed. Though NLRB precedent is not binding on this Board, I find it a useful guide on this point, especially since this Board's and the NLRA Rules and Regulations pertaining to unit modification are similar in several areas.

In *Kalamazoo Paper Box Corp*⁹ the National Labor Relations Board (hereafter referred to as NLRB) enumerated the factors to be considered in determining the community of interest:

Factors which warranted consideration in determining the existence of substantial difference in interests and working conditions include:

8. National Labor Relations Board Rules and Regulations (102.60(b)) provide a means whereby either party to a bargaining unit, whether or not established by formal NLRB representation procedures, may obtain a modification of the unit.

different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs...; the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of collective bargaining."

10

While the *Kalamazoo* case dealt specifically with truck drivers seeking severance from a production unit, the principles announced in that case have been given general application. (emphasis added) A case in point regarding general application is the

11

Cambell Son's Corp case.

As special and distinct interests of a particular group were weighed against the community of interest shared with other employees in the *Kalamazoo* and *Cambell* cases. The application of the above principle has been applied by way of the

12

Kennecott case to unit modification.

The important item in the above cases is that the NLRB enumerated the factors to be considered and applied them to both unit determination and unit modifications. Based on NLRB precedences I feel it is appropriate to apply the community of interest factors to this unit modification case.

In an effort to present an orderly discussion and conclusion of the various factors as they apply in this case, I will follow the Findings of Fact format.

Managerial

Section 59-1602(4) clearly exempts managerial employees, from a collective bargaining unit. The Montana law defines a managerial official as one who represent management with the authority to act for the agency on any matters relating to the implementation of agency policy.

9. 136 NLRB No. 10, 49 LRRM 1715 (1962)

10. The statement in case of *Kalamazoo* is as follows:

Neither unit of paper box company's truck drivers, nor unit of truck drivers, shipping department employees may be severed from production and maintenance unit, since neither truck drivers, alone, nor shipping department as such, constitute functionally distinct group with special interests distinguishable from those of other employees. (1) Truck drivers are under same supervision, receive same benefits, work same hours, are paid on same basis, and are on same seniority list as other employees, (2) Truck drivers regularly and frequently interchange with other employees to such an extent that they may not be said to constitute separately identifiable unit, and (3) shipping department employees also interchange duties with production employees.

11. NLRB *v* *Cambell Son's Corp* 407 F2d 969

12. *Kennecott Copper Corp* 176 NLRB No. 13 71 LRRM 1188 (1969)

the NLRB has consistently excluded from bargaining units "managerial" employees -
2 those who formulate and effectuate management policies by expressing and making
3 operative the decisions of their employer.¹³

4 After reviewing NLRB decisions on the point, an appeals court¹⁴ decided that the
5 NLRB seems to use two tests in determining who is a managerial employee. He is
6 either (1) one who, while not a supervisor, is so closely related to or aligned
7 with management as to present a potential conflict of interest between employer and
8 employees; or (2) one who formulates, determines, or effectuates an employer's
9 policies, and who has discretion in the performance of his job, but not if the
10 discretion must conform to the employer's established policies.

11 This Board has never attempted a "precise definition" of the term "managerial
12 employee". Nevertheless in determining whether individuals are managerial employees
13 a guideline has been whether certain non-supervisory employees have a sufficient
14 community of interest with the general group of employees constituting the bulk of
15 a unit so that they may appropriately be considered a part thereof. In other words,
16 where the interest of certain employees seem to lie more with those persons who
17 formulate, determine, and oversee agency policy than with those in the proposed
18 unit who merely carry out the resultant policy the Board tends to exclude them from
19 the unit.

20 I conclude that Ms. Bidwell cannot be excluded from this unit based solely on
21 the Montana statute and the Board's criteria. Although she does represent
22 management and assists in the implementation of some policy during the infrequent
23 absence of the cashier, the record indicates that her authority to act for the water
24 board is limited in time frame and scope.

25 I find that her interests are closely aligned with her supervision and the
26 water board, but not to the degree of presenting a potential conflict of interest
27 between employer and the employees. I could find no evidence that Ms. Bidwell has
28 the discretion to formulate or determine the water board's policies. She does on
29 rare occasions assist in the implementation of water board policies.

30 I recognize that she is appointed by the water board for a definite term and
31

32 13. *Palace Laundry Dry Cleaning Corp* 21 LRRM 1039

14. *Retail Clerks v NLRB*, CA Dist. Col., (1966)

2 record it becomes a clear that she is under the close supervision of the cashier.
3 The record also indicates that her duties involve a great deal of clerical-
4 bookkeeping work. There were no examples presented which illustrated "managerial"
5 decisions made on her part. I find that her salary, which is the lowest in the
6 water department, does not indicate that she performs managerial duties.

7 In total, some points or arguments can be made to exclude Ms. Bidwell, namely
8 she serves as a cashier at times and has a two year appointment, but those areas are
9 not significant enough to exclude her under the managerial factor.

10 Mr. Miller is the cashier and is required to perform the duties and assume the
11 responsibilities as outlined in the city codes.

12 Mr. Gonder testified that the water board meets once a month and that Mr. Miller
13 acts as the ex-office secretary and is responsible for implementing Board policies
14 on a day-to-day operational basis.

15 The testimony of Mr. Miller indicates that Mr. Miller's interests are more
16 closely aligned with the water board, who he is directly responsible to, than to the
17 bulk of the unit. Though there are no examples of so called "managerial" decisions
18 there is no doubt that he can and does act on behalf of the board on numerous
19 occasions. In total, major arguments have been made to exempt Mr. Miller as a
20 managerial official. However, because the responsibilities of the water board are
21 limited, in comparison to the total operations of city government, I conclude he
22 should not be exempt solely on the managerial factor.

23 In summary, I am giving Ms. Bidwell minor weight towards exemption and Mr.
24 Miller major, but not total, weight for exemption under the managerial factor.

25 Community of Interest

26 The Community of interest is a fundamental factor and it is therefore necessary
27 to evaluate the conditions in order to determine where the predominant community
28 of interest exists or does not exist. I have previously discussed the NLRB cases
29 and the community of interest factors as they apply to unit determination and unit
30 modification.

31 Findings of Facts number ten, thirteen, sixteen, and seventeen persuasively
32 outline the different job duties, skills, physical working area of the office

2 The NLRB has a long established policy of excluding office employees from units
3 of manual workers if there are separate working areas, little interchange among
4 other employees, minor integration of work function, and distinct skills. 15

5 The Findings of Facts (ten through twenty) clearly illustrate that the petitioners
6 do not share a substantial community of interest with the service and maintenance
7 employees of the water department nor with the other city employees in the unit.
8 In resolving the unit issue, the Board's primary concern is to group together only
9 employees who share a substantial community of interest. It is not the Board's

10
11 15. (A) *Extendicare of West Virginia* 6 June 1973, 203 NLRB No. 170 83 LRRM 1242

12 Employees in medical records department and business office of employer's for
13 profit hospital are excluded from unit of technical, service, and maintenance employee
14 since they are essentially office workers who have little contact with other employees

15 (B) *Georgetown University* 10 November 1972 200 NLRB No. 14 82 LRRM 1046

16 The NLRB agreed with the Union's request for a unit of service and maintenance
17 employees only. The employer contended the unit should be an overall unit to include
18 all non-academic personnel.

19 The following employees are excluded from unit of service and maintenance employee
20 of private non-profit university: (1) office clericals, since the Board has long-
21 established policy of excluding office clericals from units of manual workers; (2)
22 technical employees, since they have community of interest separate and distinct from
23 other non-academic employees, it appearing they have separate line of supervision,
24 that they are trained to become proficient in a technical line, that they receive
25 close supervision by other technicians, and that nature of their work is substantially
26 different from that of service and maintenance employees.

27 (C) *Shattuck School (Minnesota)* 189 NLRB No. 118 77 LRRM 1164

28 Office clerical employees excluded from proposed unit of maintenance and service
29 workers because they work under direction of comptroller, who carries out the office
30 and business function of school.

31 Perform bookkeeping and record-keeping tasks, and usual office correspondence,
32 billing and payroll. They do not interchange with the maintenance and service employee
who have strictly maintenance and service functions.

(D) *North Dade Hospital (Florida)* 86 LRRM 1262 May 13, 1974 210 NLRB No. 82

Billings clerks and admitting clerks are excluded from unit of hospital and clinic
employees, since they perform clerical functions and have little involvement with
employees engaged in care or treatment of patients.

(E) *Captial City, Inc. (Kansas)* 10 July 1974 212 NLRB No. 52 86 LRRM 1497

The NLRB decision was to separate the pressroom employees from the employees engag-
in retail sale of office furniture, supplies and printed material. (blueprint)

The employer contended the two groups of employees should be one appropriate overa-
unit. However NLRB rules that because the pressroom and blueprint employees have dis-
tinct skills, do not interchange with other employees, have separate work area and
separate immediate supervision, earn higher wages than other employees, and have limit-
contact with other employees there should be two different units. All employees receive
the same fringe benefits. They also work under different foremen.

Under the community of interest category, I conclude that the petitioners herein have satisfied the major requirement placed upon them in Section 59-1602(2), R.C.M. 1947. However, I do find some areas under this category whereby there is a common community of interest among the employees in the unit. Therefore, I must give major weight, but not total, for the petitioners exemption under the community of interest factor.

Desires of Employees

The effectiveness of the collective bargaining process depends in large part on the coherence of the employees in the unit. There is seldom any real problem in determining the employees' desires when there is no dispute among them as to the appropriate unit. However, when there is a modification petition before the board, especially one presented by the employees, then the desires of the employees becomes a critical factor. The petitioners testified that they do not desire to be a member of this unit.

The U.S. Court of Appeals, Tenth Circuit (Denver) 1964¹⁶ held that the NLRB made a mistake and the employer was denied full hearing on critical issue of appropriate unit for representation proceeding when NLRB completely ignored or failed to give consideration to expressed desires of salaried drivers as to whether they wished to be included in unit of laundry's in-plant production and maintenance employees.

The Court ruled that while desires of employees with respect to their inclusion in a bargaining unit is not controlling, it is a factor which NLRB should take into consideration in reaching its ultimate decision.

This Board will decide each case the unit appropriate for modification for the purpose of collective bargaining. In performing this function, the Board must maintain the two-fold objective of insuring to employees their rights to self-organization and freedom of choice in collective bargaining and of fostering public employment peace and stability through collective bargaining.

In determining the appropriate unit the Board delineates grouping of employees within which freedom of choice may be given collective expression. At the same time it creates the context within which the process of collective bargaining must function. Because the scope of the unit is basic to and permeates the whole of the collective

16. *NLRB v Ideal Laundry and Dry Cleaning Co.* 56 LRRM 2036

bargaining relationship, each unit determination or unit modification, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. Such a determination should not create a state of chaos, but rather foster stable collective bargaining. To ignore the expressed desires of ten percent of this unit could hardly be said to assure to employees the fullest freedom in exercising the rights guaranteed by this Act or foster stable labor relations as contemplated by the Public Employees Act.

AFSCME argues that because the city did not file a counter-petition to the Union's unit determination petition nor did the city challenge the votes of the two petitioner therefore, they should be included in the unit.¹⁷

I can only point out that the two petitioners were included in the unit. Because of the nonaction of the employer does it mean that the two employees should continue to be a part of this unit forever? I think not. There are several reasons for the Board allowing unit modification petitions, (1) when the duties and responsibilities of a position have changed, since the original unit determination, as create some doubt about the continuing appropriateness of those positions inclusion; (2) if the employees petition that they were originally inappropriately included; (3) changes in political subdivision organization; or (4) changes in union structure. In this case, the employees never had the opportunity to formally present their arguments and desires for exclusion in either the unit determination or election proceedings.

Moreover, my determination here rests upon a finding required by the pertinent facts presented that the two employees do have special and distinct interests, which outweigh and override the community of interest shared with other city employees. In these circumstances it would result in creating a fictional mold where the parties would be required to force their bargaining relationship.

EXTENT OF UNION ORGANIZATION

The evidence indicates that the extent of union organization, as outlined on the

17. Finding of Fact No. 25 and 26 indicate some confusion on the part of the petitioners as to the purpose and meaning of the election and their inclusion in the unit.

Mr. Gerke points out that AFSCME is an industrial type union. That this union has locals which encompass many different occupations and job classifications.

In a nationwide review of certified AFSCME bargaining units in Government Employees Relations Report ¹⁸ I find that some AFSCME units include all departments in a major city, and some units include all the statewide employees of a major state department.

It appears that many of the larger broad based units alluded to in the Report were established by the extent of the union organization with management agreeing to the scope of the unit. In the matter of Unit Modification I find little guidance, especially as it involves an AFSCME unit.

It is not denied that the broader bargaining unit contended by AFSCME in this case could be an appropriate unit. Section 59-1602(2) does list the extent of union organization as a criteria in determining or modifying a unit.

In looking at NLRA precedences I find Section 9(c)(5) provides that, "In determining whether a unit is appropriate the extent to which the employees have organized shall not be controlling."

The U.S. Supreme Court has said that this provision clearly was intended to overrule NLRB decisions where unit determined could only be supported on the basis of the extent of organization. But, the Court added, the provision was not intended to prohibit the NLRB from considering extent of organization as one factor, though not the controlling factor, in its unit determination. ¹⁹

I conclude that to keep the petitioners in the unit solely on the basis of the extent of union organization would be contrary to Section 59-1602(2) and to all factors mentioned in that section. Especially in view of the fact that the Montana statute is silent on this factor as a part of unit determination or unit modification.

D. Bargaining History

The success of bargaining patterns may be judged by their history. This Board is loath to disturb existing units, whether established by agreement or by certification, when bargaining in those units have been successful over a period of time. However,

18. Bureau of National Affairs, Inc., Washington D.C.

19. NLRB v Metropolitan Life Ins. Co. U.S. Supreme Court, 1965 58 LRRM 2721

change circumstances.

GENERAL CONCLUSIONS

Though this is the first extensive decision on this matter, I think the question of unit modification will continue to be a difficult and perhaps an elusive problem to the Board for sometime. A definite policy, I believe can only be developed over a long period of time on a case-to-case method.

In a thorough review of the record it is clear that AFSCME failed to effectively counteract some of the petitioner's contentions. Furthermore in a number of categories AFSCME didn't even attempt to do so.

In this case, I conclude that the petitioners herein have satisfied the requirements placed upon them. And, in view of the difference between them and the bulk of the unit in various degrees in every category (managerial, community of interest, history of collective bargaining, desires of employees) I find that the unit, excluding cashier and assistant cashier satisfies the obligation placed on the Board in determining a continuous appropriate unit.

I cannot emphasize enough that this decision to exclude the petitioners is based on the fact that they were able to present testimony and evidence illustrating differences between their positions and the rest of the unit in every category.

It is not my intent to establish a Board precedent to allow every employee who may feel a union is not adequately representing his perceived interests to file a unit modification petition.

CONCLUSION OF LAW

I find that the petitioners positions are distinct and different enough from the other employees in the bargaining unit therefore the modification petition is appropriate.

RECOMMENDED ORDER

It is ordered that Mr. Jess E. Miller and Ms. Sue J. Bidwell, Cashier and Assistant Cashier, respectively, of the City of Livingston Water Department be excluded from the certified bargaining unit: American Federation of State, County and Municipal Employees, AFL-CIO, Local 2711 effective on the date of this decision.

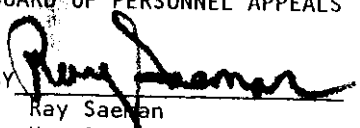
2 of MAC 24-3.8(10) - S8089 (11)(b); specifically the following provision: "If
3 the clarification or modification is found to be appropriate the Board shall
4 schedule an election or pre-election conference. It is additionally recommended
5 that the parties inform, in writing, the Board's Executive, By 19 April 1976,
6 of their decision whether or not to waive the above rule.

7 NOTICE: Exceptions may be filed to these Findings of Fact, Conclusion of Law,
8 and Recommended Order within twenty (20) days service thereof. If no exceptions
9 are filed with the Board within the period of time, the Recommended Order shall
10 become a Final Order. Exceptions shall be addressed to the Board of Personnel
11 Appeals, 1417 Helena Avenue, Helena, Montana 59601.

12 Dated this 19th day of March 1976.

13 BOARD OF PERSONNEL APPEALS

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15 BY


16 Ray Saeman
17 Hearing Examiner
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